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No. 84-965

IN THE

Supreme Court of the United States

October Term, 1984

AIRWELD, INC.,
Petitioner,

v.

AIRCO, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

FERGUSON & BURDELL
C. David Sheppard
David R. Lord*
Attorneys for Petitioner Airweld, Inc.

Office and Post Office Address:
29th Floor, One Union Square
Seattle, Washington 98101
Telephone: (206) 622-1711

*Member of the United States Supreme Court Bar

TABLE OF CONTENTS

	Page
In Reply to Facts as Stated or Argued by Respondent ...	1
In Reply to Respondent's Argument Re Tying Claim	3
In Reply to Respondent's Argument on the Robinson-Patman Act Claim	6
In Reply to Respondent's Argument re Attempt to Monopolize.....	7
Conclusion	9

TABLE OF AUTHORITIES

Table of Cases

Page

FTC v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960) 8,9

Hanover Shoe v. *United Shoe Machinery Corp*, 392 U.S. 481 (1968) 6

Imperial Point Colonnades Condominium v. *Mangurian*, 549 F.2d 1029 (5th Cir. 1977) 3

William Inglis & Son Baking Co. v. ITT Continental, 668 F. 2d 1014 (9th Cir.), *cert. denied*, 459 U.S. 839 (1982) 8

Jefferson Parish Hospital v. *Hyde*, _____ U.S. _____, 104 S. Ct. 1551 (1984) 4,5

Kaiser Aluminum v. *Avondale Shipyards*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) . 4,5

Transamerica Computer Co. v. *IBM Corp.*, 698 F.2d 1377, 1384-1385 (9th Cir.), *cert. denied*, _____ U.S. _____, 104 S.Ct. 370 (1983) 8

Utah Pie Co. v. *Continental Baking Co.*, 386 U.S. 685 (1967) 9

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 4,5,6

Statutes

Clayton Act, Section 3 (15 U.S.C. §14) 2

Sherman Act, Section 1 (15 U.S.C. §1) 2

Sherman Act, Section 2 (15 U.S.C. §2) 7

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REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN REPLY TO FACTS AS STATED OR ARGUED BY RESPONDENT:

The facts proven at trial established that in the Portland market in early 1973, when petitioner Airweld's initial five year contract with respondent Airco was about to expire, there was only one potential supplier of atmospheric gases to petitioner Airweld, and that was the respondent Airco. Two other "suppliers," Liquid Air and Linde, were present in the market. Linde, however, had no local production facilities and had a nationwide policy against its distributors reselling atmospheric gases in bulk. Because the bulk business was a very significant component of petitioner Airweld's operation, Linde was not a viable supplier. Liquid Air, on the other hand, while it did not have such a policy, did not have sufficient capacity to serve its own needs (see Respondent's Brief in Opposition, hereinafter "Resp. Br.," p. 6). Prior to entering into the "renewal" contract

with Airco in 1973, Liquid Air informed Airweld that it would not supply Airweld with atmospheric gases. (Cf. Resp. Br., p. 17, to the Ninth Circuit Opinion, p. A-20 of the Petition for Writ of Certiorari, hereinafter "Pet. Br.").

Air Products was not in the Portland market and had no facilities nearby from which to economically service the market. The record does not support respondent's statement (Resp. Br., p. 17) that Air Products commenced efforts to become a substantial factor in the market. As known from the record, Air Products "efforts" to enter the market were confined to a 1974 discussion with Airweld concerning Air Products' desire to acquire Airweld and/or to supply products to it at some indefinite point in time in the future. Other "efforts" by Air Products dealt with different product markets.

The record demonstrates that Respondent Airco had the requisite "special ability" and "sufficient economic power" to bring it within the ambit of § 1 of the Sherman Act and § 3 of the Clayton Act.

At Resp. Br., p. 5, Airco attaches some unstated significance to the fact that the Airco-Airweld contract permitted Airweld to solicit better prices from any available source (although there were none), which Airco was then permitted to match. However, the record also indicates that the industrial gas market in Portland was characterized by industry-wide, uniform price increases which were effective at the same time (see, e.g., Tr 540-41). So, the "benefit" extended by the contract was illusory.

Also on the subject of prices, at Resp. Br., p. 18, Airco apparently argues that it did not have the requisite market power because Petitioner Airweld was able, on occasion, to somewhat ameliorate the effects of price increases. The fact is that Airweld had significant volume, thus entitling it to better prices, vis-a-vis other distributors with lesser volumes in other locations, but — Airco was *always* able to raise its prices to Airweld.

Also at Reps. Br., p. 5, Airco states that there were "... four independent contracts, one covering Airweld's requirements of acetylene and the other relating to purchases of bulk oxygen,

nitrogen and argon" and that purchases of acetylene "... from another supplier would have had no effect upon Airco's commitment to supply other gases...." Respondent Airco's characterization of the contract, JX 126, is inaccurate. JX 126 consists of an "Authorized Distributors Agreement (Oxygen, Acetylene And Other Industrial Gases)" to which are attached three "Supplements" dealing with liquid nitrogen, oxygen, and argon. Clearly, and by their terms, if the "Distributors Agreement" for some reason failed, the Supplements also failed. And this was precisely the vice of the Airco policy and threat — that Airweld could not obtain acetylene from other than Airco and remain as an Airco distributor — the ability to purchase atmospheric gases disappeared with the distributorship. Other pertinent facts regarding the contract are set out at Pet. Br., pp. 2,6, 9-10.

Airco's statement of product independence reflects what should have been, not what was.

IN REPLY TO RESPONDENT'S ARGUMENT RE TYING CLAIM

Respondent argues that the Ninth Circuit holding in the instant case is not in conflict with the Fifth Circuit holding in *Imperial Point Colonnades Condominium* v. *Mangurian,* 549 F.2d 1029 (1977) because that case referred to "recent conduct" justifying recovery while the Ninth Circuit found no such "recent conduct."

Only on the most superficial basis does this reasoning reconcile these cases.

The conflict is revealed by comparison of the conduct, and timing thereof, which the *Mangurian* court found to be "recent conduct," and the conduct which the Ninth Circuit refused to so find.

Mangurian involved a contract which tied condominum ownership to a lease of recreational property and required the condominium owners to pay the rent. The lease provided a

mechanism for escalation of the annual rents. Prior to the limitations period, plaintiffs purchased condominium units and became bound to the terms of the lease. The defendant lessor continued to collect the rent and increased the rent within the limitations period. The district court granted summary judgment on the basis of the statute of limitations.

Following an extensive review of cases, including those of this Court and of the Ninth Circuit, the Fifth Circuit held that the defendant's "recent acts" (the continued collection of rent and the increase in rental, pursuant to the pre-limitations contract), constituted a continuing violation of the antitrust laws for which the plaintiffs were entitled to recover and that the cause of action for damages suffered within the limitation period was not barred by the statute of limitations. Damages which accrued in the period between the pre-limitations contract and the beginning of the period of limitations were barred.

In the instant case, the record establishes a pre-limitations contract entered into on an unlawful condition, to-wit, that petitioner Airweld could not purchase atmospheric gases from Airco unless it also purchased Airco's acetylene. The record also establishes that the price required to be paid for the "tied" product acetylene was supra-competitive. During the limitations period, respondent Airco continued to exact supra-competitive prices and increased those prices. The Ninth Circuit held petitioner's *entire* cause of action to be barred by the statute of limitations.

Thus, there is conflict between the Ninth and the Fifth Circuits as to the type of conduct which gives rise to a continuing violation of the antitrust laws.

In support of the proposition that the Ninth Circuit was correct in its refusal to apply the continuing violation exception to the facts of this case, Resp. Br., p. 20, cites *Jefferson Parish Hospital* v. *Hyde*, _____ U.S. _____, 104 S.Ct. 1551 (1984); *Zenith* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971); and *Kaiser Aluminum* v. *Avondale Shipyards*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

The *Hyde* case did not involve the continuing violations exception.

In *Kaiser,* the facts were significantly different; that case involved a single pre-limitations contract which fixed all of the rights and liabilities of the parties, including the obligation to make payments over time. Any injury to competition occurred solely at the time of the contract. In contrast, the contract in the instant case did not fix all of the rights and liabilities of the parties, or the amounts to be paid. Here the impact upon Petitioner Airweld occurred with each purchase of acetylene from Airco. Competition was not injured until others were foreclosed from the opportunity to compete for the business of Airweld with respect to each purchase of acetylene.

Zenith is of little help to respondent in the context of the continuing violation exception. In that context, it supports petitioner Airco's position in this controversy.

Zenith is, perhaps, most cited for the proposition that the statute of limitations does not bar from recovery such damages as cannot be proven with the requisite certainty at the time the cause of action would otherwise accrue. The parties here are not in disagreement as to the rule of law, but rather as to its application. Contrary to the rule in *Zenith,* the Ninth Circuit has held, in effect, that even though damages may be speculative at the time the cause of action would otherwise accrue, a plaintiff may not thereafter recover those damages (when they become fixed and certain) unless during the intervening period there have been additional acts violative of the antitrust laws.

This holding confuses the continuing violation exception with the speculative damage exception and emasculates the latter.

Without commenting on the patent error of the Ninth Circuit, Respondent Airco argues that the damages sought by Petitioner Airweld were not speculative when the contract was executed and are, therefore, later barred.

That the damages were earlier speculative within the meaning of the *Zenith* exception is established by the facts of the case. The 1973 contract was an "Evergreen" contract, *i.e.*, it automatically renewed from year to year unless terminated by one year's notice in advance. Under it the term was indefinite, the quantity of acetylene to be purchased was unknown, and the unit price (beyond the first year) to be paid for whatever quantity was purchased was subject to later agreement. Quantity, perhaps, could have been estimated on an annual basis; but, for how many years? Future pricing was solely in the control of Airco and would depend upon market conditions yet to occur. Further, and more crucially, the "competitive prices" (what the prices would have been, over time, absent the unlawful restraint) to which actual prices would be compared in order to estimate damages, would depend upon speculation on supply and demand factors which did not exist in the marketplace, to-wit: what price would have prevailed *in futuro* had Airweld been allowed to build an additional acetylene production plant to serve a market which already had excess capacity. Such speculation is directly contrary to the rationale of *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and, if attempted, would have been barred.

IN REPLY TO RESPONDENT'S ARGUMENT ON THE ROBINSON-PATMAN ACT CLAIM:

With one exception, respondent's arguments are anticipated in the petition and are not repeated. It should be noted, however, that by arguing the "objective" of, and what was "planned" by, the swap agreements (Resp. Br., pp. 6, 25), Respondent Airco emphasizes the factual nature of the "sale" *vel non* question and indicates the district court's error in overturning the verdict of the jury.

The argument which is not anticipated in the petition is asserted at Resp. Br., pp. 26-27. Essentially, the argument is that

had the swap partners fixed the "settlement value" at the same higher price as that paid by Petitioner Airweld, there would be no cause of action for discrimination and everything else would have remained the same.

In other words, the argument is that "if things had been different, they would have been different." But this does not answer the problem which did exist, and which arose out of the situation which actually existed.

Airco argues that if the price to Linde and Liquid Air had been higher, those firms would have acted the same. Not only is this contrary to the common experience of man, but also it assumes too much.

The evidence shows that the settlement price was set in rough relationship to the costs of production. From this it can be reasoned that an imbalance in the arrangement in favor of one party was without particular significance because the price it paid, whether in dollars or kind, was approximately the same. However, if the price to the party owing on an imbalance were greater in dollars than in kind, there would be a disincentive to the creditor in the arrangement to request product owed to it; in its economic self-interest it would prefer the greater value of the dollars owed. Therefore, market forces would have been different if the "settlement price" were different. And, those different forces would impact competition and Airweld.

IN REPLY TO RESPONDENT'S ARGUMENT RE ATTEMPT TO MONOPOLIZE:

In its Petition for Writ of Certiorari, Airweld argued that the Ninth Circuit has departed from clear guidelines imposed by the United States Supreme Court in determining anticompetitive conduct in attempted monopolization claims under the Sherman Act, 15 U.S.C. § 2. The thrust of Airweld's argument was that the Ninth Circuit had employed a mechanistic and artificial cost test, which alters plaintiff's the burden of proof. Specifically, the Ninth Circuit's utilization of the "Areeda-Turner test," as

modified in *Transamerica Computer Co.* v. *IBM Corp.*, 698 F.2d 1377, 1384-1385 (9th Cir.), *cert. denied,* _____ U.S. ____ _____, 104 S. Ct. 370 (1983), was a departure from the standard promulgated by this Court in *FTC* v. *Anheuser-Busch, Inc.*, ("Anheuser-Busch") 363 U.S. 536, 80 S. Ct. 1257, 4 L. Ed. 2d 1385 (1960).

In *Anheuser-Busch*, this Court determined that: "A price reduction below cost tends to establish such an (predatory) intent." 363 U.S. at 552. If the Ninth Circuit had applied this standard of proof, that Court would have had no choice but to reinstate the jury verdict for Airweld.

In its responsive brief Airco ignores the Ninth Circuit's clear departure from accepted case law, and instead argues in much the same fashion as it did in the Court of Appeals and in the district court, ignoring most of its conduct and compartmentalizing the balance for separate examination of each fraction. This approach was necessarily rejected by the jury in finding for Airweld.

Even should this Court adopt for the first time the evidentiary standard utilized by the Ninth Circuit, still Airweld should prevail because it has presented substantial evidence as to each of the elements of attempted monopolization. See *William Inglis & Son Baking Co.* v. *ITT Continental,* 668 F.2d 1014 (9th Cir.), *cert. denied,* 459 U.S. 839 (1982).

In proving that Airco had the specific intent to injure or destroy competition, Airweld presented probative evidence of Airco's "targeting" of Airweld's customers. Additionally, a third party testifed that Airco representatives told him that Airco was going to get their share of the market back "any way they could" and had the subsidy with which to do it. Further, Airco engaged in severe price cutting to customers of this third party in an attempt by Airco to "encourage" him to sell his business to it.

Airweld established the requisite anticompetitive conduct of Airco by proof of below cost pricing, approaches by Airco to a

majority of Airweld's customers, and the so-called "argon squeeze" (Tr 763-780).

Airweld carried its burden with respect to presenting substantial probative evidence of the dangerous probability of success of Airco monopolizing the Portland cylinder gas market. Airco is a billion-dollar corporation which possessed approximately 30% of the relevant market; Airweld suffered losses resulting from Airco's conduct that amounted to 25% of its *pre-tax* profit.

Airco continues to claim (Resp. Br., pp. 30-34) that Airweld's "proof" of predatory conduct consisted solely of evidence of approaches by Airco Welding Supply to only 17 of Airweld's customers. However, these seventeen customers were only used for damage computations; there was specific evidence in the record concerning Airco Welding Supply's predatory solicitation of a majority of Airweld's customers.

At Resp. Br., p. 33, Airco argues that other elements of an economic nature were not supplied by expert testimony. These elements were either supplied by testimony of employees of Respondent Airco or were unnecessary.

If this Court adheres to the clear precedent of *Anheuser-Busch* and *Utah Pie* v. *Continental Baking*, 386 U.S. 685 (1967), then Airweld did present substantial evidence of anticompetitive conduct, and the jury verdict must be reinstated. Even if this court applies the "Areeda-Turner test" in analyzing Airco's anticompetitive conduct, Airweld met its burden of proof with respect to the elements of attempted monopolization of the relevant market.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted in order to eliminate conflict between the Ninth and Fifth Circuits concerning

the type of conduct which constitutes a continuing violation of the antitrust laws; in order to resolve a question of first impression concerning the so-called "swap agreements"; and to eliminate confusion among the circuit courts of the United States and the district courts of the United States concerning the so-called Areeda-Turner test concerning the importance of various economic factors to proof of predatory conduct.

RESPECTFULLY SUBMITTED this 8th day of February, 1985.

FERGUSON & BURDELL

By: C. David Sheppard
David R. Lord

Attorneys for Petitioner
Airweld, Inc.